

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: U S WEST COMMUNICATIONS, INC., n/k/a QWEST CORPORATION	DOCKET NOS. INU-00-2 SPU-00-11
---	-----------------------------------

ORDER TO CONSIDER UNFILED AGREEMENTS

(Issued June 7, 2002)

On February 10, 2000, the Utilities Board (Board) issued an order initiating an investigation relating to the possible future entry of U S WEST Communications, Inc., n/k/a Qwest Corporation (Qwest), into the InterLATA market. The investigation was identified as Docket No. INU-00-2.

The Board issued an order dated August 10, 2000, indicating that its initial review of Qwest's compliance with track A (competition issues), various aspects of each item on the 14-point competitive checklist, § 272 (separate subsidiary) issues, and public interest considerations would be through participation in a multi-state workshop process with the Idaho Public Utilities Commission, North Dakota Public Service Commission, Montana Public Service Commission, Wyoming Public Service Commission, and the Utah Public Service Commission. Since the time of that order, the New Mexico Public Regulation Commission has also joined in the workshop process.

On October 22, 2001, The Liberty Consulting Group (Liberty) filed a report addressing issues raised by workshop participants related to the public interest of Qwest's future entry into the in-region InterLATA market.¹ On January 25, 2002, the Board issued a conditional statement concluding that, subject to the recommendations contained in its conditional statement, Qwest had conditionally satisfied the issues relating to public interest.

On May 14, 2002, AT&T Communications of the Midwest, Inc., and AT&T Local Services on behalf of TCG Omaha (collectively AT&T) filed a motion to reopen proceedings (Motion). AT&T requested the Board reopen the record in the section 271 proceedings in order to allow admission of additional evidence relating to certain unfiled agreements between Qwest and some new entrants. According to the Motion, the unfiled agreements relate directly to the provision of interconnection services by Qwest and carry public interest implications.

By way of background, AT&T noted that the Minnesota Department of Commerce filed a complaint against Qwest in February 2002. The complaint alleged that Qwest entered into a series of confidential agreements with competitive local exchange carriers (CLECs), which were not filed with the Minnesota Public Utilities Commission. The Minnesota complaint sought penalties and other remedies against Qwest.

¹ This report was prepared by the "outside consultant," The Liberty Consulting Group (Liberty), which was retained to assist the state commissions collectively by making recommendations for resolution of impasse issues.

AT&T submits the unfiled agreements should be considered in the Board's section 271 proceedings, because they directly relate to: a) Qwest's unwillingness to provide interconnection on a nondiscriminatory basis; b) violations of federal law by Qwest, which carry public interest implications; and c) the silencing of Qwest's opponents in these and other section 271 proceedings.² Thus, AT&T seeks to reopen the proceedings so the Board can decide whether the unfiled agreements have hindered the Board's decision-making on various checklist items and the public interest inquiry.

On May 22, 2002, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a response to AT&T's motion to reopen proceedings (Response). The Response acknowledges the proceeding identified as Docket No. FCU-02-2 which is a formal complaint addressing the issues pertaining to unfiled agreements in Iowa. The April 1, 2002, "Order Docketing Complaint, Establishing Briefing Schedule, and Denying Motion to Dismiss" deferred factual investigation into AT&T's allegations until after the Board rules on the legal question of the scope of the obligation to file interconnection agreements pursuant to federal law. Consumer Advocate claims the relevance of the allegations to the public interest requirement of section 271 cannot be ignored.

Consumer Advocate points out that it has repeatedly urged that Congress intended the Federal Communications Commission (FCC) to perform a broad public

² Attached to AT&T's Motion is Exhibit A, the Affidavit of J. Jeffery Oxley, Eschelon Telecom, Inc., and dated April 18, 2002. This affidavit was originally filed in the Minnesota complaint proceeding.

interest analysis as to whether a proposed action would further the purposes of the Act. Consumer Advocate further noted the Supreme Court rejected a "cramping" of a statutory public interest requirement in favor of an "expansive" one that includes "standards for judgment adequately related in their application to the problem to be solved."³

The response from Consumer Advocate also mentions the December 28, 2001, *Sprint* remand pertaining to Southwestern Bell Telephone Company's (SWBT) 271 applications in Kansas and Oklahoma.⁴ In that case, the court suggested the FCC erroneously gave the public interest argument of opposing parties "rather a brush-off." Consumer Advocate has asked the Board to reconsider its public interest analysis in light of *Sprint*.

The allegations of secret agreements suggest that Iowa's meager local competition may be the product of collusive conduct. The allegations bear directly and materially upon attainment of Congressional purpose. If they are founded, they undercut Qwest's claim that granting 271 authority is in the public interest.

On May 22, 2002, Qwest filed its opposition to AT&T's motion to reopen proceedings (Opposition), and on May 24, 2002, Qwest filed its response to Consumer Advocate (Qwest Response). Qwest's Opposition states that AT&T is

³ *National Broadcasting Co. v. United States*, 319 U.S. 190, 217-20 (1943).

⁴ *Sprint Communications Co. L.P. v. Federal Communications Comm'n*, 274 F.3d 549 (D.C. Cir. 2001) ("Sprint")

attempting to inject complex, unrelated, and unresolved issues into this docket. As state commissions, the FCC, and reviewing courts have repeatedly emphasized, matters such as these are best addressed in proceedings separate from section 271 applications. To the extent these issues warrant review and investigation in Iowa, the Board has already docketed FCU-02-2 for that purpose.

Qwest argues that AT&T's Motion is overreaching. Although Qwest has routinely filed hundreds of interconnection agreements pursuant to section 252, AT&T does not assert that each contract between an ILEC and a CLEC is subject to the section 252 filing requirements. AT&T itself expects certain of its contractual arrangements with Qwest to be confidential and not subject to filing. At most, Qwest maintains AT&T is simply disputing Qwest's line drawing in a relative handful of situations where Qwest did not make a filing.

Qwest argues that because of the previous lack of a defined legal standard, these issues are particularly inappropriate for consideration in this section 271 proceeding. The Board should deny AT&T's obvious attempt to delay the 271 process. These issues are best addressed in another docket, which has been established by the Board for that purpose.

Qwest notes that AT&T's Motion relies heavily upon allegations regarding Qwest agreements with Eschelon Telecom, Inc. (Eschelon). Eschelon, however, does not provide services in Iowa; thus, Eschelon's agreements provide no basis for evaluating the conduct of either Qwest or Eschelon in Iowa.

Qwest notes that Consumer Advocate believes the allegations being considered in Docket No. FCU-02-2 "bear directly and materially" on the public interest inquiry. Qwest disputes the accuracy of that suggestion. The unfiled agreements involve a good-faith dispute regarding the scope of Qwest and CLECs' obligations to file certain intercarrier agreements under 47 U.S.C. § 252(a). Qwest has petitioned the FCC for a declaratory ruling to clarify for the entire industry what section 252 requires. Qwest maintains there is no reason to bring this dispute into the section 271 review of this Board while the FCC petition is pending.

Additionally, according to Qwest, there is nothing more to be learned in the public interest inquiry, because the issue has been resolved. Until the FCC rules on Qwest's petition, Qwest has committed to file with the Board all contracts, agreements, and letters of understanding with CLECs that create obligations to meet the requirements of section 251(b) or (c).⁵

AT&T's Motion makes no mention of Docket No. FCU-02-2, the Iowa proceeding previously docketed to examine allegations of unfiled interconnection agreements. An uninformed reader of AT&T's Motion might conclude that the Board has taken no action to investigate and resolve the matter.

Consumer Advocate argues the relevance of allegations in Docket No. FCU-02-2 to the "public interest requirement of section 271 . . . cannot reasonably be ignored." Additionally, Consumer Advocate continues to argue, in the wake of the

⁵ See May 10, 2002, letter from Mr. R. Steven Davis, Qwest Corporation, to the Board, attached as Exhibit 1 to Qwest's May 22, 2002, Opposition.

Sprint remand, that the Board must perform a "broad" and "expansive" public interest re-analysis.

Consumer Advocate states that the allegations of unfiled agreements suggest the "meager" local competition in Iowa may be the product of collusive conduct. Consumer Advocate urges the Board to continue to investigate in the public interest inquiry the allegations brought to light, in Docket No. FCU-02-2, before reaching a final conclusion about Qwest's 271 application.

AT&T's Motion and Consumer Advocate's Response were written prior to the Board's recent order in Docket No. FCU-02-2.⁶ In that order, the Board reached tentative findings that the unfiled agreements were in fact interconnection agreements - subject to federal and Iowa filing requirements. The order required Qwest to file any other unfiled interconnection agreements with the Board for public notice, review, and approval. Qwest was also put on notice that it would be subject to civil penalties for future violations. To a large extent, the order puts to rest the concern implied in AT&T's Motion; namely that the Board needs to address the allegations of unfiled interconnection agreements.

Consumer Advocate's concern that the *Sprint* Remand requires the Board to broaden its public interest analysis is not addressed in the Docket No. FCU-02-2 order. However, it is addressed in the Board's June 7, 2002, "Conditional Statement

⁶ See *Order Making Tentative Findings, Giving Notice for Purposes of Civil Penalties, and Granting Opportunity to Request Hearing*, Docket No. FCU-02-2, issued May 29, 2002.

Reconsidering Public Interest." There the Board determined that the *Sprint* remand is a narrow remand only requiring that the FCC further "pursue [AT&T's] price squeeze claim, or at the very least explain why the public interest does not require it to do so."⁷ Thus, the Board declined to adopt Consumer Advocate's position that:

[T]his Board, in light of *Sprint*, should tell the FCC it must reevaluate its public interest requirements and do so in a manner that's consistent with . . . what's eventually going to be told to it directly, [that] has indirectly been told to it by the D.C. Circuit in *Sprint*.⁸

For its part, Qwest goes too far in downplaying any public interest implications of the unfiled agreements when it quotes the recent *BellSouth Georgia/Louisiana 271 Order*. There the FCC stated that a 271 docket is not the place "to settle new and unresolved disputes about the precise content of an incumbent LEC's obligations to its competitors" under section 251 and 252; nor is it the place to duplicate "open issues before the [FCC]" in separate dockets.⁹

Paragraph 208 referenced an interconnection dispute between BellSouth and two CLECs over the activation of NPA/NXX codes in BellSouth's switches. The FCC noted that this issue was before it in another proceeding, and the FCC would not deny 271 approval because the other proceeding was not complete.

Qwest failed to quote the FCC's earlier pronouncement in the *Ameritech Michigan 271 Order*, which appears to be more relevant to the issue at hand:

⁷ *Sprint*, 274 F.3d, at 554.

⁸ March 14, 2002, Oral Argument, Docket Nos. INU-00-2 and SPU-00-11, Tr. p. 28.

⁹ *BellSouth Georgia/Louisiana 271 Order* released May 15, 2002, ¶ 208.

Furthermore, we would be interested in evidence that a BOC applicant has engaged in discriminatory or other anti-competitive conduct, or failed to comply with state and federal telecommunications regulations. Because the success of the market opening provisions of the 1996 Act depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations, evidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations would tend to undermine our confidence that the BOC's local market is, or will remain, open to competition once the BOC has received InterLATA authority.¹⁰

Still, this quote, like AT&T's Motion and Consumer Advocate's Response, does not prescribe a cure if a BOC has violated a telecommunications regulation. Implicitly the cure that AT&T and Consumer Advocate prescribe is a state of "public interest limbo" for Qwest.

In order for Qwest to move beyond a state of "public interest limbo," the Board has previously adopted a standard, "that past behavior must be predictive of future behavior."¹¹ This standard is met by the Board's May 29, 2002, order in Docket No. FCU-02-2. As noted above, Qwest was put on notice that it would be subject to civil penalties for failing to file agreements in the future. The prospect of significant monetary penalties should act as a strong deterrent against future violations.

¹⁰ *Ameritech Michigan 271 Order* released August 19, 1997, ¶ 397.

¹¹ *Conditional Statement Regarding Public Interest and Track A*, Docket Nos. INU-00-2 and SPU-00-11, issued January 25, 2002, p. 27.

The resolution of this issue in Docket No. FCU-02-2 would appear to serve the objectives of the FCC. Most recently the FCC indicated the following about the public interest inquiry:

Thus, the Commission views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will serve the public interest as Congress expected.¹²

The FCC appears to regard the goal of the public interest inquiry as an opportunity to identify and correct problems, beyond the competitive checklist, that would impede the opening of local markets to competition. As for Qwest's unfiled agreements, it would seem that the Board has already acted to accomplish that goal in Docket No. FCU-02-2.

Finally, AT&T argues the unfiled agreements should be considered in the 271 proceeding because they directly relate to the silencing of Qwest's opponents. However, there is no indication or evidence that the process was not complete and exhaustive with respect to the checklist items, even with the absence of certain CLECs. The ROC OSS test was not dependent on the CLEC participation because the focus was on a pseudo-CLEC. AT&T and the participating CLECs were vigorous in their participation and there is no way of knowing, even without the agreement, that other CLECs would have had the inclination to participate.

¹² *BellSouth Georgia/Louisiana 271 Order* released May 15, 2002, ¶ 280.

IT IS THEREFORE ORDERED:

1. The motion to reopen the proceedings to consider unfiled agreements filed by AT&T on May 14, 2002, and the supplemental request filed by Consumer Advocate on May 22, 2002, are denied.

2. Any responses to this statement and all future filings and Board orders or statements in this docket must be filed no later than close of business on the third business day following the filing or issuance.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 7th day of June, 2002.